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Crossing the Line: Selective Licensing of Liquefied Natural Gas Exportation Facilities Is Unconstitutional

Rebecca Kennedy*

INTRODUCTION

Horizontal drilling technology advances coupled with expansive shale gas resources have rapidly transformed the energy profile of the U.S.¹ With these advances, the U.S. is on track to become a net exporter of natural gas by 2020.² The development of natural gas in the U.S. has translated into economic growth, increased energy security, and lowered natural gas prices.³ Hyperglobalization⁴ of international trade in conjunction with the expanding natural gas exploration and production has raised numerous policy concerns in the U.S.⁵ The majority of the

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¹ *Directional and Horizontal Drilling*, NATURAL GAS.ORG, http://www.naturalgas.org/naturalgas/extraction_directional.asp (last visited Nov. 3, 2013) (explaining technological advances in horizontal drilling that have facilitated the exploration development and production of natural gas include the ability to measure while drilling (borehole telemetry) and steerable down hole motor assemblies); *Lower 48 State Shale Plays*, U.S. ENERGY INFORMATION ADMINISTRATION (May 9, 2011), http://www.eia.gov/oil_gas/rpd/shale_gas.pdf; *Annual Energy Outlook 2013: Market Trends—Natural Gas*, U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.gov/forecasts/aeo/MT_naturalgas.cfm (last visited Nov. 2, 2013).

² *Annual Energy Outlook 2013 Early Release Overview*, U.S. ENERGY INFORMATION ADMINISTRATION fig.10. (Nov. 10, 2013, 11:57 AM), [http://www.eia.gov/forecasts/aeo/er/pdf/0383er\(2013\).pdf](http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2013).pdf).

³ *See Economic Impact*, SWARTHMORE COLLEGE, <http://www.swarthmore.edu/academics/environmental-studies-capstone/economic-impact.xml> (last visited Nov. 3, 2013); *Energy Security*, ENERGY TOMORROW, <http://energytomorrow.org/energy-security> (last visited Dec. 10, 2013); *Annual Energy Outlook 2013*, U.S. ENERGY INFORMATION ADMINISTRATION (Apr. 2013), http://www.eia.gov/forecasts/aeo/MT_naturalgas.cfm (explaining that the relatively low prices of U.S. natural gas as a result of “abundant domestic supply and efficient methods of production”).

⁴ DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* 76 (2011) (defining heightened level of globalization that the WTO seeks to attain as “hyperglobalization”).

⁵ Gary Clyde Hufbauer, Allie E. Bagnall & Julia Muir, *Liquefied Natural Gas Exports: An Opportunity for America*, POLICY BRIEF: PETERSON INST. FOR INT’L ECON. (Feb. 2013), <http://www.iie.com/publications/pb/pb13-6.pdf> [hereinafter Hufbauer] (discussing the concerns of environmental interest groups resulting from the proliferation of drilling exploration operations).

public's attention has focused on hydraulic fracturing's environmental impact while failing to highlight international trade concerns.⁶

Trade restrictions on natural gas are a critical issue within the framework of energy security across the U.S.⁷ Rich deposits of natural gas along with the development of a natural gas manufacturing and export infrastructure helps the U.S. maintain leverage over the energy trade.⁸ This inherent competitive advantage in natural gas plays an essential role in providing energy security for the entire nation and enables the U.S. to play a dominant role in the international energy trade.⁹ Any restrictions on the trade of liquefied natural gas ("LNG"), an important source of energy, must be critically examined.¹⁰

Part I of this article introduces the current legislative framework that regulates the exportation of natural gas. This section explores the statutorily undefined public interest standard contained in the Natural Gas Act of 1938. The article next presents three main arguments regarding the debate on LNG export restrictions. Part II presents the problem underlying current LNG export restrictions and continues outlining how the current LNG export regime violates the international obligations that the U.S. is bound by under the General Agreement on Tariffs and Trade ("GATT"). Finally, the article argues that the Department of Energy's ("DOE") current interpretation of the public interest standard is unconstitutional. Part III concludes with recommending proposed legislation that should be adopted to ensure compliance with both domestic and international obligations.

⁶ See Corrie Clark, Andrew Burnham, Christopher Harto & Robert Horner, *Hydraulic Fracturing and Shale Gas Production: Technology, Impacts, and Policy*, GLICCC (Sept. 10, 2012), http://www.gliccc.org/wp-content/uploads/2012/10/Hydraulic-Fracturing-and-Shale-Gas-Production-Technology_Impacts_Polic....pdf (highlighting a number of policy concerns related to water quality, increased greenhouse gas emission, and health and safety have accompanied increased global demand for natural gas); Heather Cooley & Kristina Donnelly, *Hydraulic Fracturing and Water Resources: Separating the Frack from the Fiction*, PACIFIC INSTITUTE (June 21, 2012), <http://www.pacinst.org/publication/hydraulic-fracturing-and-water-resources-separating-the-frack-from-the-fiction/>.

⁷ *Energy Security*, ENERGY TOMORROW, <http://energytomorrow.org/energy-security> (last visited Dec. 10, 2013).

⁸ Ken Cohen, *Shale's Competitive Advantage; A Tale of Two Continents*, EXXONMOBIL PERSPECTIVES (Oct. 8, 2013), <https://www.exxonmobilperspectives.com/2013/10/08/shales-competitive-advantage-a-tale-of-two-continents/>.

⁹ E.g., *U.S. Trade Talks Could Deliver Cheaper Energy for Europe*, REUTERS (Dec. 16, 2013, 5:34 AM), <http://www.reuters.com/article/2013/12/16/eu-usa-trade-energy-idUSL6N0JP20L20131216> (asserting that U.S. gas could give EU leverage against Russian natural gas prices).

¹⁰ Throughout this paper, liquefied natural gas and LNG shall be used interchangeably.

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I. BACKGROUND ON THE CURRENT REGULATORY FRAMEWORK FOR LNG EXPORTS

A. *History of the Natural Gas Act and the Public Interest Standard*

Following its enactment in 1938, the Natural Gas Act profoundly influenced and shaped the natural gas industry.¹¹ The Act was the first major federal legislation to regulate the industry and was specifically created to limit the market's power over interstate pipeline companies.¹² The Federal Power Commission ("FPC"), the predecessor of the Federal Energy Regulatory Commission ("FERC"), was granted authority under the Act to regulate the sale of natural gas and approve natural gas facilities.¹³ The Act also requires that import and export operations of natural gas and LNG be approved by FERC and the DOE.¹⁴

The Natural Gas Act of 1938 requires that, "[f]ederal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."¹⁵ Therefore, one implication of the Natural Gas Act is that imports and exports of LNG from or to a foreign nation require DOE authorization.¹⁶ Before an export facility can export LNG, the DOE must evaluate the export facility's application under the public interest standard established in the Natural Gas Act.¹⁷ Because Congress has failed to define the statutory meaning of "public interest," the definition is open to the discretion of the DOE and has resulted in uncertainty in the boundaries of the public interest standard.¹⁸ There are two categories of applications to export

¹¹ 15 U.S.C. § 717 (2006) [hereinafter *The Natural Gas Act*].

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Natural Gas Regulation*, DEPARTMENT OF ENERGY, <http://energy.gov/fe/services/natural-gas-regulation> (last visited Nov. 12, 2013).

¹⁷ Hufbauer, *supra* note 5 (discussing the concerns of environmental interest groups resulting from the proliferation of drilling exploration operations. FTA countries include 20 nations with which the U.S. has a Free Trade Agreement. FTA lowers barriers on trade, while creating transparency in investments).

¹⁸ *New Policy Guidelines and Delegation Orders From Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas*, DEPARTMENT OF ENERGY (Nov. 4, 2013, 1:16 PM), <http://www.fossil.energy.gov/programs/gasregulation/authorizations/policy.pdf>.

domestically produced LNG: FTA applications and non-FTA applications.¹⁹ The 1992 amendment to the Natural Gas Act permits natural gas exports to the 20 countries that have free trade agreements with the U.S., but does not provide for non-FTA nations, and in fact, disfavors non-FTA nations in trade practices.²⁰

B. The Debate: Three Leading Arguments on LNG Export Restrictions

There are three prevailing arguments regarding export restriction on LNG in the U.S.: 1) those in favor; 2) those against; and 3) a middle ground or hybrid approach, which the DOE has adopted.²¹

1. The Proponents of Export Restrictions

Proponents in favor of export restrictions are often industrial natural gas users, such as Dow Chemical and Nucor.²² Dow Chemicals' chief executive articulated his rationale in favor of the restrictions by saying, "I'm protecting my shareholders. \$5 billion to \$6 billion in new Dow Chemical investments were depending on the continuation of low gas price."²³ Entities such as Dow Chemicals and Nucor specifically support export restrictions, because they artificially depress LNG prices.²⁴ These lower prices enable industrial consumers to enhance financial gains by cutting cost and increasing profit margins.²⁵

Industrial users also favor import restrictions because this allows them to benefit from lower gas prices.²⁶ If the market export opens up by affecting the volume of exports, then the supply of gas available will decline to meet the rising demand, which ultimately increases prices.²⁷ The surplus in supply of LNG that

¹⁹ *Applications Received by DOE/FE to Export Domestically Produced LNG from the Lower-48 States*, DEPARTMENT OF ENERGY, http://fossil.energy.gov/programs/gasregulation/reports/summary_lng_applications.pdf (last visited Nov. 12, 2013).

²⁰ See Doug Palmer, *US ban on LNG exports would violate WTO rules*, REUTERS (Nov. 3, 2013, 7:28 PM), <http://www.reuters.com/article/2013/01/31/usa-trade-lng-idUSL1N0AZMTU20130131> [hereinafter Palmer]; Clifford Krauss & Nelson D. Schwartz, *Foreseeing Trouble in Importing Natural Gas*, N.Y. TIMES (Aug. 15, 2013), <http://www.nytimes.com/2013/08/16/business/energy-environment/foreseeing-trouble-in-exporting-natural-gas.html> [hereinafter Krauss].

²¹ *Id.*

²² Krauss, *supra* note 20.

²³ *Id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ Palmer, *supra* note 20.

²⁷ Cf. OECD, THE ECONOMIC IMPACT OF EXPORT RESTRICTIONS ON RAW MATERIALS, OECD TRADE POLICY STUDIES 109 (OECD Publishing ed. 2010), available at <http://www.keepeek.com/Digital-Asset-Management/oecd/trade/the-economic-impact-of-export-restrictions-on-raw->

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exceeds the domestic need for LNG falsely lowers the price below market price.²⁸ There is a surplus because there is no outlet for exporting the surplus LNG produced due to the placement of export restrictions halts the export of LNG, creating domestic surplus of LNG.²⁹ Domestic suppliers must internalize the loss of producer surplus by selling at domestic prices, which are lower than the price at which foreign consumers value LNG.³⁰

2. *The Opponents of LNG Export Restrictions*

Pro-trade organizations, such as the National Foreign Trade Council and the Emergency Committee for American Trade, are primarily opposed to export restrictions.³¹ Opponents to export restrictions favor a liberal export policy due to fear over the potential harm export limitations could inflict upon domestic corporations.³² For example, export restrictions prevent domestic companies from maximizing profit by drastically limiting their available market.³³ This is unrealized revenue that could be used toward furthering the development of natural gas.³⁴ Consequently, American firms could be left behind and lose their weight of influence in the international energy marketplace.³⁵

Environmental groups opposing increased drilling are also in favor of export restrictions on LNG because by supporting export restrictions there is a potential to limit drilling expansion.³⁶ Environmental interests groups' main concern is that by

materials_9789264096448-en#page111 (discussing the effects of strict licensing requirements on raw materials and the manner in which they may limit exports).

²⁸ *Compare China—Measures Related to the Exportation of Various Raw Materials*, WTO (May 6, 2013), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm (summarizing key points of DISPUTE DS394 in which the U.S. filed a complaint against China for similar export restriction measures on raw materials put into place by the Chinese government. The United States' complaint explains that China's restrictive export regime provides limitations that create scarcity, which increases the price of the goods internationally while artificially suppressing the cost of goods domestically.).

²⁹ Alex Tabarrok, *The Microeconomics of Export Restrictions*, MARGINAL REVOLUTION UNIVERSITY (Nov. 10, 2013, 7:15 PM), <http://marginalrevolution.com/marginalrevolution/2013/08/the-microeconomics-of-export-restrictions.html>.

³⁰ *Id.*

³¹ See Hufbauer, *supra* note 5; see also Krauss, *supra* note 20.

³² MICHAEL RATNER, CONG. RESEARCH SERV., R42074, U.S. NATURAL GAS EXPORTS: NEW OPPORTUNITIES, UNCERTAIN OUTCOMES 5 (2013).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ RATNER, *supra* note 32; Palmer, *supra* note 20; Krauss, *supra* note 20.

broadening the consumer base for domestic LNG, drilling operations may expand.³⁷ Environmental groups specifically oppose the potential increase in drilling because drilling can cause water contamination issues³⁸ and lead to increased greenhouse gas emissions.³⁹

3. *The Hybrid Approach: The Current LNG Export Regime Adopted by the U.S.*

Finally, there is a middle ground argument, which the DOE has adopted implicitly.⁴⁰ This hybrid approach is pro-LNG exports, but without formal export restrictions.⁴¹ Utilizing this approach, the DOE has slowly approved individual projects instead of implementing explicit policy involving export restrictions.⁴² Moderating approval on an individual basis provides the DOE with the ability to monitor environmental impact while slowing environmental damage.⁴³ Consequently, environmental degradation would decrease through the limitation of drilling operations of LNG and be unable to expand until export facilities have been approved.⁴⁴ Furthermore, the limits on exports regulate the balance of supply and demand and prevent drastic price fluctuations in LNG.⁴⁵ Ultimately, by utilizing this approach natural gas can still be exported on a limited case-by-case basis while still providing domestic environmental and economic protection.⁴⁶

³⁷ *Id.*

³⁸ Sally Entrenkin et al., *Rapid Expansion of Natural Gas Development Poses a Threat to Surface Waters*, 9 FRONTIERS ECOLOGY & ENV'T 503, 503–11 (2011) (discussing environmental concerns of drilling related to surface water).

³⁹ RATNER, *supra* note 32; Palmer, *supra* note 20; Hufbauer, *supra* note 5 (explaining that the environmentalist perspective is against a trade policy that would provide incentive to increase drilling activity due to the negative environmental impact that drilling could have in the U.S. If the export facilities are to be approved by the DOE and the FERC then drilling operations would expand as a result of the opening of an outlet for exports of LNG. If exports restrictions are lifted, the environmentalists fear that there could be a chance for a surge in drilling operations, which would in turn increase the potential for environmental harm.).

⁴⁰ Palmer, *supra* note 20.

⁴¹ Krauss, *supra* note 20.

⁴² *Id.*

⁴³ *See id.*

⁴⁴ Palmer, *supra* note 20.

⁴⁵ *Id.*

⁴⁶ *Id.* (suggesting that limiting drilling operations would provide environmental protection. Economic protection would be provided by artificially suppressing supply by limiting export facility approval).

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II. DEFINING THE PROBLEM

A. *An Overview of the General Agreements on Tariffs and Trade (GATT)*

One of the premiere multilateral trade international treaties that the U.S. has signed is the “GATT,” which governs international trade goods.⁴⁷ The GATT was enacted in 1948 as part of post-World War II’s Bretton Woods system, which was specifically for the purpose of stabilizing the international economy, and still remains in full force today.⁴⁸ This international trade agreement has been foundational in creating a large body of binding international law including the creation of the World Trade Organization Agreement and eight complete rounds of multinational trade agreements, the most recent being the Uruguay Round in 1994.⁴⁹

The GATT is a multinational effort to promote a globalized market of free trade through promulgating rules by which member nations agree to be bound.⁵⁰ The conceptual foundation of the GATT lays in the “most-favored nation principle” whereby countries may not utilize discriminatory trade practices between their trading partners.⁵¹ FTAs are incompatible with the GATT and undermine the GATT’s underlying goals.⁵²

B. *Quantitative Restrictions: Export Licensing and Permitting Requirements Violate the GATT*

Article XI of the GATT explicitly bans export licenses by prescribing:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas,

⁴⁷ *GATT and the Goods Council*, WTO, http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (last visited Nov. 3, 2013 10:00 PM).

⁴⁸ General Agreement on Tariffs and Trade, 61 Stat. A-11, 55 U.N.T.S. 194 (Oct. 30, 1947); *From GATT to the WTO and Beyond Research Guide*, GEORGETOWN LAW, <http://www.law.georgetown.edu/library/research/guides/FromtheGATTtotheWTO.cfm> (last visited Nov. 3, 2013, 11:00 PM) [hereinafter GATT].

⁴⁹ GATT, *supra* note 48 (These are agreements created by international organizations for the purpose of promoting equality and liberalization of international trade. Signatories of these agreements are bound by the terms of the agreement. Said agreements utilize enforcement mechanisms such as sanctions in order to ensure that the agreements are honored.).

⁵⁰ WILLIAM H. COOPER, CONG. RESEARCH SERV., RL31356, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 3 (2012).

⁵¹ *Trade Without Discrimination*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Nov. 3, 2013, 11:04 PM).

⁵² See Hufbauer, *supra* note 5, at 9–10.

import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.⁵³

Gary Hufbauer, a senior fellow at the Peterson Institute for International Economics, has criticized the U.S.'s adoption of the hybrid approach by stating, "[i]t would be hypocritical and contrary to World Trade Organization [WTO] rules for the U.S. to impose restraints on the export of LNG while permitting unfettered domestic consumption of natural gas."⁵⁴ This process of receiving authorization has served to halt trade countries not a party to the FTA.⁵⁵ Out of almost thirty non-FTA applications received by the DOE to export LNG to non-FTA nations, only four applications have been approved.⁵⁶

Export licenses have a discriminatory effect by favoring exports to countries that have FTAs with the U.S. over non-FTA countries.⁵⁷ Such delays are impermissible limitations of trade under the GATT. Alternatively, the extensive permitting process required to meet environmental requirements also has the potential to cause undue delay. For example, because the Federal Clean Water Act requires that an export facility operator apply for a permit, an operator must go through an additional licensing step before beginning operations.⁵⁸

LNG regulation, or regulation of the liquid component of natural gas, is distinct from the regulations of natural gas.⁵⁹ Numerous types of permits and

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Nick Snow, *DOE Approves Dominion Cove Point LNG Exports to Non-FTA Countries*, OIL & GAS J. (Sept. 11, 2013), <http://www.ogj.com/articles/2013/09/doe-approves-dominion-cove-point-lng-exports-to-non-fta-countries.html>; *LNG Export Study*, DEPARTMENT OF ENERGY, <http://energy.gov/fe/services/natural-gas-regulation/lng-export-study> (last visited Nov. 3, 2013, 8:50 PM) (The applications for non-FTA exports evaluate energy security, economic and environmental impact).

⁵⁷ See *Applications for Authority to Import and/or Export Natural Gas to/from the U.S.*, DEPARTMENT OF ENERGY (Nov. 3, 2013, 9:50 PM), <https://app.fossil.energy.gov/app/fergas/DocketOrderList.go>.

⁵⁸ 33 U.S.C. § 1251 (2006).

⁵⁹ See *EPA's Liquefied Natural Gas Regulatory Roadmap*, EPA (July 2006), http://www.netl.doe.gov/technologies/oil-gas/publications/LNG/LNG-RegulatoryRoadmap_EPA.pdf.

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licenses must be obtained before operating a LNG exportation facility.⁶⁰ For example, FERC must approve all international exports of LNG from the U.S.,⁶¹ and the DOE may impose further restrictions if a license is granted.⁶² The process of obtaining these licenses and permits is time intensive and costly.⁶³ Such delays in export licensing are a gross violation of the GATT, which has determined even a three-month delay to be impermissible.⁶⁴ The GATT does provide some exceptions to compliance, such as critical shortages, conservation of an exhaustible natural resource when domestic consumption is not similarly constrained, and as part of government stabilization plan.⁶⁵ The export restrictions on LNG in the U.S., however, are not covered by any of these exceptions.⁶⁶

Finally, the DOE has largely ignored the international obligations that the U.S. is under. The DOE has largely disregarded international obligations due to the unconstrained discretion in the licensing process. Even though the DOE has instituted various application criteria, the agency maintains complete discretion when deciding whether to grant a license.⁶⁷ Considerations for licensing are non-exclusive and include: domestic need for natural gas, natural gas supply, U.S. energy security, and economic impact.⁶⁸ The DOE's absolute discretion is the mechanism by which the DOE circumvents international obligations without valid justification.

⁶⁰ *Id.* figs.1 & 2 (demonstrating the EPA's role in the LNG Project permitting process that involves air and water permits, FERC authorization, DPA license, USCG processes license, etc.).

⁶¹ *Department of Energy Organization Chart*, DEPARTMENT OF ENERGY, <http://energy.gov/about-us/organization-chart> (last visited Nov. 4, 2013) (demonstrating that FERC is a regulatory commission under the Department of Energy).

⁶² *See* Hufbauer, *supra* note 5, at 5–6.

⁶³ Alan M. Dunn, *Trade in Natural Gas: The Resource, The Law & The Choices*, STEWART & STEWART (Mar. 7, 2013), http://www.stewartlaw.com/article/ViewArticle/850#_edn3 (emphasizing that DOE's licensing process in many cases can take over two years, as is the case with considering the current export license applications).

⁶⁴ *Id.*

⁶⁵ GATT, *supra* note 48.

⁶⁶ *Id.*

⁶⁷ Scott Lincicome, *License to Drill: The Case for Modernizing America's Crude Oil and Natural Gas Export Licensing Systems*, CATO INSTITUTE FREE TRADE BULLETIN No. 50 (Nov. 3, 2013, 9:57 PM), <http://www.cato.org/publications/free-trade-bulletin/license-drill-case-modernizing-americas-crude-oil-natural-gas>.

⁶⁸ *Id.*

C. *Consequences of Export Restrictions as Illustrated by China*

Restrictions to natural gas exports violate various international trade agreements, which make it impermissible to restrict exports in order to gain a domestic price advantages.⁶⁹ The U.S. has opposed this position, arguing against export restrictions executed by other nations.⁷⁰ For instance, the U.S. argued, in front of the WTO appellate court, that China's restrictions on raw material exports were unjust, because they favored Chinese producers of raw materials and lowered domestic prices in China.⁷¹ Furthermore, the U.S. has taken action against China for China's discriminatory trade practices.⁷²

The U.S. filed a complaint against China for similar export restriction measures on raw materials put into place by the Chinese government.⁷³ The China export restriction policy is similar to the export restriction regime of LNG in the U.S.⁷⁴ Therefore, the U.S. implicitly acknowledges the conflict that exists between such export restriction schemes and the GATT.⁷⁵ Additionally, the economic consequences of restricting exports are analogous regardless of the good being traded.⁷⁶ In the complaint made by the U.S. against China, the U.S. emphasizes that raw material export limitations create scarcity, which increases the price of the goods internationally while artificially suppressing the cost of goods domestically.⁷⁷ By initiating this complaint, the U.S. has recognized the export restraints on LNG are inharmonious with the WTO.⁷⁸

It is ironic that the U.S. receives imports of LNG from non-FTA countries but uses discriminatory practice against non-FTA countries in authorizing export

⁶⁹ GATT, *supra* note 48 (prohibiting quantitative restrictions that make the surplus of a domestic product available to domestic consumers below the current market level).

⁷⁰ See Hufbauer, *supra* note 5, at 9–10 (citing examples of internationally contested export restraints used by China such as raw materials and rare earth export restrictions).

⁷¹ James Bacchus, *U.S. Should Rethink Restrictions On Natural Gas Exports*, INT'L BUS. TIMES (Aug. 19, 2013, 3:47 PM), www.ibtimes.com/fighting-words/us-should-rethink-restrictions-natural-gas-exports-1390823.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Hufbauer, *supra* note 5, at 9–10.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

facilities.⁷⁹ For example, even though the U.S. imported natural gas primarily from the nations of Trinidad and Tobago, Qatar, and Algeria,⁸⁰ the U.S. does not have FTA agreements with these countries.⁸¹ From an analysis of the U.S. domestic trading scheme, the U.S. policy for LNG trade is inherently biased against non-FTA countries.⁸²

D. Constitutionality of LNG Export Restrictions

The U.S. has a constitutional obligation to uphold the GATT and other binding international agreements.⁸³ The U.S. Constitution, Article 1 § 8, cl. 10, contains the offenses clause, which grants Congress the power to punish violations against the law of nations.⁸⁴ The broad interpretation of the offenses clause of the Constitution takes “the law of nations” to mean “international law” in the general sense.⁸⁵ Multilateral treaties such as the World Trade Organization Agreement, General Agreement on Trade in Services, and the GATT are multinational agreements that make up the body of international law by which the U.S. is bound.⁸⁶ Therefore, Congress has a constitutional obligation to enforce international law.⁸⁷ Congress also has a constitutional obligation to uphold the law of nations in the broadest sense; and agencies derive their rule making authority from Congress.⁸⁸ Actions by federal agencies based on an agency statutory interpretations, must not be incongruent with the body of international law.⁸⁹

⁷⁹ *Id.*

⁸⁰ *Natural Gas Supply*, NATURALGAS.ORG, <http://www.naturalgas.org/business/analysis.asp#domesticng> (last visited Nov. 3, 2013).

⁸¹ *Free Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Dec. 13, 2010, 10:27 AM).

⁸² See Hufbauer, *supra* note 5.

⁸³ See U.S. CONST. art. 1, § 8, cl. 10.

⁸⁴ *Id.*

⁸⁵ Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 449 n.1 (2000) (quoting MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 (1988)); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. 41 (Introductory Note to Chapter 2 1990) (“[T]he law of nations, [was] later referred to as international law.”).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

The DOE's permitting program LNG exports undermines the "most favored nation" principle of the GATT by favoring FTA countries over non-FTA nations.⁹⁰ An agency interpretation of a statute in conflict with international law should not be given deference when it goes beyond the bounds of the authority that Congress possess to delegate to the agency.⁹¹ Congress does not have the power to delegate authority beyond the Constitution, accordingly, agency interpretations that are inconsistent with the constitution are impermissible, and actions resulting therefrom must be banned.⁹² Ultimately, the DOE's interpretation of "public interest" should therefore be consistent with GATT if it is to be deferred to.⁹³

III. RECOMMENDATIONS

The Natural Gas Act of 1935 currently governs the approval of LNG export terminals.⁹⁴ By 2020 the U.S. will shift from a net importer of natural gas to net exporter.⁹⁵ The booming supply of natural gas has been met with proposed legislation to accelerate the rate and degree of LNG exportation.⁹⁶ Legislation must catch up with the rapid expansion of the natural gas industry and increasing demands to expand LNG exports.⁹⁷ With greatly increasing energy demands in the U.S. and internationally, threats to the development of the natural gas industry need to be critically evaluated from all perspectives.⁹⁸

Legislation should be adopted that would expand the public interest standard in order to eliminate export restrictions. The current regulatory regime severely restricts natural gas exports to non-FTA nations.⁹⁹ In recently proposed legislation,

⁹⁰ See GATT, *supra* note 48.

⁹¹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

⁹² *Id.*

⁹³ See *Chevron*, 467 U.S. at 837.

⁹⁴ The Natural Gas Act, *supra* note 11.

⁹⁵ *Id.*

⁹⁶ E.g., S. 192, 113th Cong. (2013); H.R. 580, 113th Cong. (2013); H.R. 1189, 113th Cong. (2013); H.R. 1191, 113th Cong. (2013) [hereinafter Proposed Legislation].

⁹⁷ Jenny Chang, *Sierra Club and Environmental Coalition Petition the Department of Energy to Revise Out-of-date Rulemaking Policy on Natural Gas Exports*, SIERRA CLUB (Apr. 8, 2013), <http://content.sierraclub.org/press-releases/2013/04/sierra-club-and-environmental-coalition-petition-department-energy-revise-out> (arguing that the current 30-year-old policy guidelines for approving natural gas exports are outdated and recommending that new regulations be adopted to approve applications to develop LNG export terminals).

⁹⁸ *Id.*

⁹⁹ See Hufbauer, *supra* note 5, at 4.

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there is a demand from Congress to pull back on the power it has delegated the DOE and to increase exportation of LNG.¹⁰⁰ A Senate bill introduced in early January of 2013, S.192, allows for the creation of an expedited and accelerated approval process of LNG export requests.¹⁰¹ This bill would further expand the current DOE interpretation of the “public interest” standard¹⁰² to include:

(1) a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas (as under existing law); (2) a member country of the North Atlantic Treaty Organization (NATO); (3) Japan, as long as the Treaty of Mutual Cooperation and Security between the U.S. and Japan remains in effect; and (4) any other foreign country if the Secretary of State determines that such exportation promotes U.S. National security interests.¹⁰³

House Bill 580 is another bill that is being considered¹⁰⁴ and proposes an expedited approval process without modification or delay similar to Senate Bill 192.¹⁰⁵ This bill would go even further than S.192 to amend the Natural Gas Act so as to provide for the exportation of natural gas to foreign nations to be consistent with the public interest standard set for in the Natural Gas Act.¹⁰⁶ The expedited approval process for exporting would only apply to exportation to 1) FTA countries 2) a member country of the North Atlantic Trade Organization 3) Japan and 4) any other foreign country if the Secretary of State determines that such exportation promotes U.S. National security interests.¹⁰⁷ This bill expands the current

¹⁰⁰ See Proposed Legislation, *supra* note 96.

¹⁰¹ S. 192, 113th Cong. (2013); 15 U.S.C. § 717(b) (2012).

¹⁰² The Natural Gas Act, *supra* note 11.

¹⁰³ *Bill Summary*, LIBRARY OF CONGRESS (Nov. 3, 2013, 11:30 PM), <http://beta.congress.gov/bill/113th/senate-bill/192>.

¹⁰⁴ H.R. 580, 113th Cong. (2013); *Civic Impulse*, GOVTRACK (Nov. 3, 2013, 11:33 PM), <https://www.govtrack.us/congress/bills/113/hr580>.

¹⁰⁵ S. 192, 113th Cong. (2013); *CRS Summary*, LIBRARY OF CONGRESS (Nov. 3, 2013, 11:45 PM), <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00580:@@D&summ2=m&>.

¹⁰⁶ H.R. 580, 113th Cong. (2013).

¹⁰⁷ S. 192, 113th Cong. (2013); *CRS Summary*, LIBRARY OF CONGRESS (Nov. 3, 2013, 11:45 PM), <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00580:@@D&summ2=m&:NATO>; *Member Countries*, NATO, http://www.nato.int/cps/en/natolive/nato_countries.htm (last modified Apr. 9, 2013).

exportation regime carried out currently, but still has limitations at the discretion of the Secretary of State.¹⁰⁸

IV. CONCLUSION

The DOE's interpretation of the "public interest" standard within The Natural Gas Act of 1938 is inconsistent with U.S. obligations to international treaties, specifically GATT.¹⁰⁹ The DOE's approval process for LNG exportation is discriminatory because it favors FTA countries over non-FTA nations.¹¹⁰ Bestowing an advantage on the FTA countries over non-FTA countries is the exact type of discrimination that undermines the most favored nation principle that is fundamental to the GATT.¹¹¹ Because Congress has a constitutional obligation to enforce the law of nations, which includes binding multilateral treaties such as GATT,¹¹² the DOE's interpretation, which allows for export discrimination, conflicts directly with GATT and should be deemed unconstitutional.¹¹³ Legislation should therefore be adopted to broaden the public interest standard and avert discrimination of non-FTA nations.¹¹⁴ Legislation that halts discriminatory export practices is in the best interest of the U.S. for energy security, economic growth, and national security, thereby serving the public interest.¹¹⁵

¹⁰⁸ See H.R. 580, *supra* note 106.

¹⁰⁹ 15 U.S.C. § 717(c) (2012); *GATT and the Goods Council*, WTO, http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (last visited Nov. 3, 2013, 10:00 PM).

¹¹⁰ See Hufbauer, *supra* note 5.

¹¹¹ *Trade Without Discrimination*, WTO (Nov. 3, 2013, 11:04 PM), http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

¹¹² U.S. CONST. art. I, § 8, cl. 10.

¹¹³ See *id.*

¹¹⁴ Proposed Legislation, *supra* note 96.

¹¹⁵ See *id.*

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